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In the Supreme Court of the United States

OCTOBER TERM, 1898.

No. 430.

ELIZABETH M. HUMPHRIES, BY NEXT FRIEND, ETC.,
PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFF IN ERROR.

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STATEMENT.

The plaintiff in error sued the District of Columbia for damages for personal injuries caused by the negligence of the corporation. The plea was "not guilty." At the trial before Cole, J., at the October Term, 1896, the cause was submitted to a jury, of whom John T. Wright was foreman. A sealed verdict was authorized, and on the assembling of the court, the next day, such sealed verdict, signed by all twelve of the jurors, was handed the court by a physician, who stated that Mr. Wright was ill and physically unable to appear in court, and that he had received from him such verdict with directions to deliver it to the court. The defendant objected to the reception of the sealed verdict, but the court, upon being informed by the remaining eleven jurors, upon their oath, that they severally signed the verdict, that they saw Mr. Wright sign it, and that the name "John T. Wright" signed thereto is in his own handwriting, accepted the document as the verdict of the jury, and ordered it spread upon the minutes. Counsel for the defendant asked that the jury be polled and the eleven present severally acknowledged the verdict as theirs.

The defendant then moved the court in arrest of judgment, one of the grounds being—

> "2. Because there was no verdict rendered by the jury in the said cause upon which judgment may be rendered."

Defendant also moved for a new trial, one ground being—

> "7. And because of the irregularity and insufficiency of said verdict."

Both of these motions were overruled by the trial judge, and judgment was entered on the verdict as recorded.

Defendant appealed to the Court of Appeals, but failed to file a transcript of record within the time fixed by the rules of that court, and the appeal was dismissed May 10, 1897. 11 App. Cas. D. C. 68.

Defendant then, *and at the second term after the term at which judgment was entered*, moved the trial court to vacate the judgment on the ground that the verdict was a nullity and the judgment void. The trial judge held that he was without power to deprive plaintiff of her judgment, and denied the motion. Defendant again appealed to the Court of Appeals, which held the verdict a nullity, the judgment void, and remanded the cause with directions to vacate the judgment, set aside the verdict, and grant a new trial.

From this judgment plaintiff took a writ of error to this court.

ASSIGNMENT OF ERRORS.

The Court of Appeals erred in the following particulars:

1. In holding that the written verdict signed by all the jurors was not a lawful verdict.

2. In holding that the judgment entered upon such verdict was void.

3. In directing that such judgment be vacated and set aside.

ARGUMENT.

1. The contention of plaintiff is that after the term at which the judgment was entered (October Term, 1896), neither the trial court, or the Court of Appeals, had jurisdiction to entertain a motion to vacate the judgment. If this be true, then the form of order is immaterial. Precisely this question was determined by this court in—

Phillips *vs.* Negley, 117 U. S. 665.

2. The term having ended at which the judgment was entered, the court was without *power* to entertain the motion to vacate, made at the second term thereafter.

Bronson *vs.* Shulten, 104 U. S. 410.
Phillips *vs.* Negley, 117 U. S. 665.
Hume *vs.* Bowie, 148 U. S. 255.

But the claim of the corporation is that *the judgment was void*, and therefore subject to be vacated *at any time*. Upon this ground alone the Court of Appeals justified its decision.

There are two answers to this contention:

First. The trial court in receiving the sealed verdict as the verdict of the jury was right. Its action in that particular was not even erroneous.

Second. If the trial judge was wrong in thus receiving the writing as the verdict, yet this was *error only*, to be reviewed, if at all, on appeal. It did not render the judgment *void*.

THE VERDICT GOOD.

The Court of Appeals considered the written (sealed) verdict as nothing more than a memorandum, of no legal vitality whatever, and held that there was *no* verdict because the twelve men did not *orally* declare their finding. The right to poll, and have a separate declaration by each juror, is de-

clared a fundamental right, of which the litigant may not be deprived without his *express* consent.

This view is wholly unsound. Polling the jury is a mere local practice. It is unknown in the New England States.

School District *vs.* Bragdon, 3 Foster, 507.
Com. *vs.* Roby, 12 Pick. at 514.

It is most frequently declared to rest within the sound discretion of the trial judge; certainly in civil causes.

Smith et al. *vs.* Mitchell, 6 Georgia, 458.
Bell *vs.* Hutchings, 86 Georgia, 562.
Byrne *vs.* Grossman, 65 Pennsylvania State, 310.
Whitney *vs.* Hamlin, 12 Florida, 18.
Blum *vs.* Pate, 20 California, 69.
Landes *vs.* Dayton, Wright (Ohio), 659.

And the better opinion seems to be that it is not proper to permit a poll, when, with the previous consent of the court, the jury have dispersed.

City Bank *vs.* Kent, 57 Georgia, 283.
Hancock *vs.* Winans, 20 Texas, 320.
School District *vs.* Bragdon, 3 Foster, 507.
State *vs.* Engle, 13 Ohio, 490.
Sutliff *vs.* Gilbert, 8 Ohio, 405, 408.
Pierce *vs.* Hasbrouck, 49 Ill. 23.

And the idea that the written verdict is only a memorandum (which has its foundation only in a dictum of Judge Gibson, 10 S. & R. 84), is utterly opposed to the judgment of this court in *Koon* vs. *Insurance Co., 104 U. S. 106*, where a sealed verdict having, against objection, been read, amended in form, and recorded, all in the *absence of the jury*, it was held to be a good verdict, and the judgment upon it a good judgment. If the writing was a *memorandum only*, there never was a verdict in the case.

The only difference between Koon *vs.* Insurance Co., and the case at bar is that the bill of exceptions in that case recites an agreement of parties to a sealed verdict, while here there was no *express* agreement. But it was tacitly agreed, and assent will be presumed from the absence of objection.

Parmlee et al. *vs.* Sloan, 37 Indiana, 469–480.
Douglass *vs.* Tonsey, 2 Wend, 352.
High *vs.* Johnson, 28 Wis. 72.

It is submitted that the decision in Koon *vs.* Insurance Co. is logically conclusive of this question; but a brief review of some of the State decisions may be of interest.

In Murray *vs.* O'Neal, 1 Call, (Va.) 216, (1798), after the jury had retired it was agreed by the counsel that they should deliver a privy verdict to one Peyton, the deputy clerk of the court. The jury delivered a verdict at the office of the deputy clerk, who was not then present, where another clerk sealed up the verdict with other papers in the case, and put them upon a table; the deputy sheriff then discharged the jury. Peyton, on coming in, sent for the jury, but eleven only appeared, and they were again discharged. The county court gave judgment on the verdict, the district court reversed it "because it did not appear that all the jury were present at the delivery of the verdict;" but the county court was sustained by the Court of Appeals, and its judgment affirmed. The view of the court must have been that *the writing signed by all the jurors was the verdict, and not a mere memorandum.*

The best considered case, and one raising squarely the question whether the signed writing or the subsequent oral delivery is the verdict, is from Texas. Hancock *vs.* Winans, 20 Texas, 320. It was agreed that the jury might return their verdict, sealed, to the clerk. They did so and dispersed. On the assembling of the court, all the jury being present, defendant requested that they be polled, and severally asked if they then, *at the time of its publication*, agreed

to the verdict. Upon objection by plaintiff the court refused to allow such inquiry, but polled them as to whether or not they agreed to the verdict *at the time it was sealed and handed to the clerk.* (323.) On full consideration the Supreme Court sustained the trial judge, and in a carefully prepared opinion showed the danger which would result from a different rule, saying—

> " . . . to permit them to be afterwards polled, to answer whether they are still agreed, after having heard the opinions of others and been subjected to improper influences, would be to render the sealed verdict as unsafe and insecure as the ancient privy verdict," etc.

New Hampshire.

The objection was, that after the jury had been permitted by the court to seal up their verdict and separate the evening before, "the court refused a poll of the jury at the time of returning the verdict and before the same was recorded." The judgment was affirmed, the court holding that the practice of polling had never obtained in New England and that the parties had no right to demand it. Of the sealed verdict they said:

> "This practice operates well for the convenience and comfort both of the court and the jury, and is prejudicial to the rights of no one. But were we, after such an agreement and separation, and the consequent exposure of the members of the jury to be talked and tampered with by witnesses, parties and their friends, to allow a poll, it would not infrequently happen, we apprehend, that some one of the jury might be induced to change his views, and upon a poll disavow his agreement to the verdict; and thus might the whole labor of the trial be lost."
>
> School District *vs.* Bragdon, 3 Foster, 507.

So the same court held that a change of opinion by a juror after he had agreed to a verdict, and the verdict had

been sealed up, and the jury had separated, furnished no cause for refusing the verdict.

Nichols *vs.* Suncock Mfg. Co., 4 Foster, 437.

The case of Williams *vs.* State, 60 Mayland, 402, is not in confiict with these decisions. That was a criminal cause. The indictment was for murder, which crime in that State is divided into two degrees; the foreman orally declared the finding to be guilty in the first degree, but on being polled each juror said only, "guilty," and the trial court having sentenced for the first degree, the Court of Appeals reversed the judgment for error, holding the verdict a nullity.

In holding that there was error the Maryland court was perhaps right; it did not hold, however, that the judgment *was void*; and if its assertion that the verdict was null on the ground stated is equivalent to declaring the judgment void, then it is directly opposed to this court in a strikingly similar case.

Ex parte Eckart, 166 U. S. 481.

Second. However Erroneous the Manner of Receiving the Verdict, the Judgment is Not Void.

If the trial judge erred in accepting the written verdict, and ordering it recorded as the verdict of this jury, it was *error* only and did not render his judgment void.

Failing to perfect an appeal the defendant lost its right to complain of the error.

In Cross *vs.* North Carolina, 132 U. S., 132, a criminal cause, in which the jury were polled *before they had found a verdict*, this court, while not approving the practice, affirmed the judgment below, saying "it was a mere error in procedure or practice, that did not affect the substantial rights of the defendant."

The Court of Appeals held that the departure from correct practice was so shocking as to amount to a deprivation of the right of trial by jury. But to warrant the assertion

that a judgment is void for want of compliance with constitutional requirements it is essential that there be—

> "a *plain and substantial* departure from the fundamental principles upon which our government is based, so that it could with truth and propriety be said that if the judgment were suffered to stand, the party aggrieved would be deprived of his life, liberty or property in violation of the provisions of the Federal Constitution."
>
> Wilson *vs.* North Carolina, 169 U. S. at 593.
> Allen *vs.* Georgia, 166 U. S. 140.
> Hovey *vs.* Elliott, 167 U. S. 409.

> "It is not possible to hold that a party has without due process of law been deprived of his property, when, as regards the issue affecting it, he has by the law of the State, a fair trial in a court of justice, according to the modes of procedure applicable to such cases."
>
> Davidson *vs.* New Orleans, 96 U. S. 97.
> Hustado *vs.* Calif, 110 U. S. 516.

So it is laid down that to avoid a judgment, otherwise than on direct proceedings, it must appear either—

1. That the court was without jurisdiction of the person; or,

2. That the court was without jurisdiction of the subject-matter; or,

3. That the judgment was in excess of the power of the court.

> Ex parte Yarborough, 110 U. S. 651.
> Freeman on Judgments, 116, 120.

> "The general rule is that when a court has jurisdiction by law of the offense charged and of the party who is so charged, its judgments are not nullities. There are exceptions to this rule, but when

> they are relied on as foundations for relief in another proceeding, they should be clearly found to exist."
>
> Ex parte Bigelow, 113 U. S. 331.

As in the last case cited, the question which arose in the case at bar was one which the court "was competent to decide, which it was bound to decide, and its decision was the exercise of jurisdiction."

> Ex parte Parks, 93 U. S. 18.
> Ex parte Yarborough, 110 U. S. 651.

In a later case, where the claim was that the constitutional right of trial by an impartial jury was denied by acceptance of incompetent jurors this was held to be an allegation of error only.

> Re Schneider, 148 U. S. 162.

In the still later case of Eckart, where the petitioner was convicted of murder, the jury failed to specify the degree of the crime as required by law. The court accepted the verdict and sentenced the prisoner as for the highest degree of the crime. It was held both by the Supreme Court of Wisconsin and by this court, that—

> "while the conviction under the sentence was erroneous, the error in passing sentence was not a jurisdictional defect, and the judgment was therefore not void. . . . It was within the jurisdiction of the trial judge *to pass upon the sufficiency of the verdict* and to construe its legal meaning, and, if in so doing he erred . . . it was an error committed in the exercise of jurisdiction."
>
> Re Eckart, 166 U. S. 481.
> Re Belt, 159 Ib. 95.

An examination of the cases cited by the learned Court of Appeals will show that none of them is a fair precedent for the action in this case. They declare the refusal to allow

a poll, etc., to be error, but do not decide that it may be more than that.

Since the judgment was not *void*, however *erroneous*, the trial court was right in afterward declaring want of jurisdiction, after the passing of the term, to vacate the judgment.

Phillips *vs.* Negley, 117 U. S. 665.

The argument found in the opinion of the Court of Appeals that the error (as declared) of the trial judge, was an error of *fact*, it is submitted, is wholly baseless. To hold the action of the trial judge in ordering the written verdict to be recorded as the finding of the jury, to have been a mistake *of fact*, is to ignore all distinctions between fact and law.

It is submitted that the judgment of the Court of Appeals should be reversed, and the order of the trial judge affirmed.

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